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In The
Supreme Court of the United States

MARVEL DAVIS, JEFF HOLLAND, PHYLLIS PIERSON, STEVE MICHAEL, VIRGINIA SOUDERS, ROGER AND BLANCA SOUDERS, MENACHEM AND OMARJORIE ARDON, BRUCE RIEMENSCHNEIDER, DOUGLAS ZEIFHEIT AND NORMA ZEIFHEIT, ROJEAN GUM, CLARENCE R. MICHAEL, BURTON AND LOIS SCOTT, BYRON AND ROBERTA SCOTT, ROYCE AND MARILYN THOMPSON, HARRY SCHOGER, JAMES J. AND ROSEANN BUHLE, KATHRYN A. WEISS, RUTH A. LAWSON, DANIEL W. McKINNEY, LEONARD HANSEN, RONALD H. NAUMAN, HAROLD W. MARTI, BRUCE C. DEVICK, LOIS WEEKS, CHESTER SCOTT, THE POOR CLARES OF JOLIET, THE WAYNE PEACOCK FAMILY TRUST, JOSEPH J. RITCHIE, CHARLES ANZELEL, JR., LONNA MOELLERING (BOYCE FARM), BRUCE C. AND SHIRLEY L. THOMPSON, CHARLENE J. DAVIS, ANN L. BREEN, JEANENE SIPOS, PRISCILLA AND KENNETH W. JORSTAD, ELLEN BOLTE, AUSTIN S. WEEKS, VERA A. LONG, GERALD R. LONG, DOUGLASS H. LONG, REBECCA L. ALDRICH, KIRK FRIESTAD, JESSE DALE, CAROLE MONSON, NANCY McCARTHY, THE HEAP FAMILY PARTNERSHIP AND MARY MOSS,

Petitioners,

vs.

KIRK BROWN AND THE ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE ILLINOIS CORRIDOR PROTECTION STATUTE VIOLATE THE TAKINGS CLAUSE?

A. CAN THE STATE EXERCISE AN "OPTION TO TAKE" FROM PRIVATE PROPERTY OWNERS FOR A HIGHWAY WHICH IS PROPOSED BUT UNCERTAIN FOR AN UNLIMITED TIME PERIOD?

B. IS IT CONSTITUTIONALLY PERMISSIBLE FOR THE STATE TO USURP LOCAL BUILDING AND ZONING CODES, AND EXERCISE JURISDICTIONAL CONTROL OVER PROPERTIES WHICH LIE IN THE PATH OF A PROPOSED BUT UNCERTAIN HIGHWAY?

C. UNDER THE TAKINGS CLAUSE, CAN THE STATE DETERMINE THAT A PUBLIC NEED EXISTS WHEN THE TRIGGERING MECHANISM FOR THAT DETERMINATION IS THE DEVELOPMENT PLAN OF A PRIVATE PROPERTY OWNER INSTEAD OF AN AUTHORIZED PUBLIC PROJECT?

II. DOES THE ILLINOIS CORRIDOR PROTECTION STATUTE VIOLATE THE DUE PROCESS CLAUSE?

PARTIES TO THE PROCEEDING

A list of all the parties is contained in the caption and the Plaintiffs herein are not a corporation.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

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Marvel Davis, et al. v. Kirk Brown, et al., 357 Ill.App.3d 176, 827 N.E.2d 508 (2nd Dist. 2005). App. A-22.

BASIS FOR SUPREME COURT JURISDICTION

The Illinois Supreme Court entered its Opinion and Order on June 2, 2006. (App. A-1). Petitioners seek review of that judgment on a writ of certiorari.

This petition is filed timely pursuant to 28 U.S.C. § 1257(a) and U.S. Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review, on a writ of certiorari, the judgment entered by a state court of last resort.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Amendment V, Takings Clause
Amendment XIV, Due Process Clause

STATEMENT OF THE CASE

The initial complaint was filed on September 11, 2002. At issue in this controversy remains the constitutional validity of the Illinois Corridor Protection Statute, found at 605 ILCS 5/4-510. That statute reads:

The Department[1] may establish presently the approximate locations and widths of rights of way for future additions to the State highway system to inform the public and prevent costly and conflicting development of land involved.

The Department shall hold a public hearing whenever approximate locations and widths of rights of way for future highway additions are to be established. The hearing shall be held in or near the county or counties where the land to be used is located and notice of the hearing shall be published in a newspaper or newspapers of general circulation in the county or counties involved. Any interested person or his representative may be heard. The Department shall evaluate the testimony given at the hearing.

The Department shall make a survey and prepare a map showing the location and approximate widths of the rights of way needed for future additions to the highway system. The map shall show existing highways in the area involved and the property lines and owners of record of all land that will be needed for the future additions and all other pertinent information. Approval of the map with any changes resulting from the hearing shall be indicated in the record of the hearing and a notice of the approval and a copy of the map shall be filed in the office of the recorder for all counties in which the land needed for future additions is located.

Public notice of the approval and filing shall be given in newspapers of general circulation in

[1] The Department refers to the Illinois Department of Transportation, hereinafter referred to as "IDOT" or "the State".

all counties where the land is located and shall be served by registered mail within 60 days thereafter on all owners of record of the land needed for future additions.

The Department may approve changes in the map from time to time. The changes shall be filed and notice given in the manner provided for an original map.

After the map is filed and notice thereof given to the owners of record of the land needed for future additions, no one shall incur development costs or place improvements in, upon or under the land involved nor rebuild, alter or add to any existing structure without first giving 60 days notice by registered mail to the Department. This prohibition shall not apply to any normal or emergency repairs to existing structures. The Department shall have 45 days after receipt of that notice to inform the owner of the Department's intention to acquire the land involved; after which, it shall have the additional time of 120 days to acquire such land by purchase or to initiate action to acquire said land through the exercise of the right of eminent domain. When the right of way is acquired by the State no damages shall be allowed for any construction, alteration or addition in violation of this Section unless the Department has failed to acquire the land by purchase or has abandoned an eminent domain proceeding initiated pursuant to the provisions of this paragraph.

Any right of way needed for additions to the highway system may be acquired at any time by the State or by the county or municipality in which it is located. The time of determination of the value of the property to be taken under this

> Section for additions to the highway system shall be the date of the actual taking, if the property is acquired by purchase, or the date of the filing of a complaint for condemnation, if the property is acquired through the exercise of the right of eminent domain, rather than the date when the map of the proposed right-of-way was filed of record. The rate of compensation to be paid for farm land acquired hereunder by the exercise of the right of eminent domain shall be in accordance with Section 4-501 of this Code.

In their first complaint, the Petitioners alleged that the statute at issue violated due process, substantive due process and was a taking in violation of the Constitution. Petitioners alleged that the Illinois Department of Transportation invoked the statute against the Petitioners' property. As a result, Petitioners were unable to incur development costs, or place improvements in, upon or under their property, which IDOT has proposed as a possible, future right-of-way. The timeframe for this involuntary servitude remains indefinite. Petitioners further alleged that prior to invoking the statute and recording the map, IDOT failed to make any public needs analysis. IDOT and its agents had repeatedly and publicly acknowledged that IDOT does not know if the road will be necessary. Petitioners have no statutory mechanism to contest IDOT'S imposition of the provision.

The Corridor Protection Act consists of two layers. First, the statute identifies Petitioners' property and records a map of reservation in the County where that property is located. The affected property owners (here, the Petitioners) are then notified. Once notified, the property owner must seek permission from IDOT prior to incurring any development cost or placing any improvements within

the map of reservation. IDOT then has the right to approve the improvements or to institute eminent domain proceedings to take the property. 605 ILCS 5/4-510 contains no time limitation relative to the duration of the State's possessory interest, thus a property owner is subject to the statute until the State decides to build the highway or abandons the proposed project.

Respondents filed a combined 2-615 and 2-619 Motion to Dismiss. The Respondents submitted that no taking had occurred. Further, Respondents maintained that because no taking had occurred, Petitioners have neither sustained nor are in immediate danger of sustaining a direct injury, so that Petitioners have no standing to seek declaratory relief. After hearing oral argument, the trial court entered a dismissal order under 735 ILCS 5/2-615. (App. at 43).

Petitioners filed an amended complaint, which added additional facts and alleged that the application of 605 ILCS 5/4-510 violated substantive due process, constituted an inverse condemnation and remained an impermissible abuse of police powers. Respondents again responded with a combined 2-615 and 2-619 motion and the trial court granted the same. (App. at 40). Likewise, the trial court dismissed Petitioners' second amended complaint, finding that Petitioners had no standing to allege constitutional claims. (App. at 38).

Petitioners filed their timely appeal on April 19, 2004, and on April 13, 2005, the appellate court affirmed the trial court, albeit for different reasons. (App. at 21). The Illinois appellate court held that the Corridor Protection Statute was constitutional in that it did not depart from established law relative to the eminent domain process. Although it held that Petitioners have standing, the appellate

court found the Corridor Protection Statute to be largely procedural, having no substantive impact. Finally, the appellate court found that the public need issue raised by the Petitioners was premature. In other words, whether the State could make a determination of "present public need" based upon a property owner's proposed improvements should be adjudicated, if ever, in a traverse motion once eminent domain has been invoked under this statute. In effect, the appeals court held that Petitioners' argument was not ripe as it related to the Due Process Clause and rejected Petitioners' taking claim.

The Illinois Supreme Court granted certiorari and upheld the appellate court for entirely different reasons. (App. at 1). The highest court in Illinois found that the statute at issue did have an impact, but it was not of a sufficient timeframe so as to constitute a regulatory taking. (App. at 11-13). Relying upon a 1975 case from New Jersey concerning a similar, but different statute, the Illinois Supreme Court found that the regulatory impact of the Corridor Protection Statute was only 165 days. The Court held the legislation at issue to be facially valid (App. at 13), but failed to address whether the State can ever have an option to take private property for a public improvement which may or may not occur. Nor did the Illinois Supreme Court explain how a public need could suddenly arise which would compel the State to acquire a tiny portion of a proposed project due solely to the private landowner's plans to develop. Because the Illinois Supreme Court did not analyze the plain and obvious ramifications of the challenged statute, it failed to explain why the involuntary servitude the State has granted itself lasts for only 165 days. Unlike the New Jersey statute relied upon by the court of last resort in Illinois, the Illinois

legislation completely preempts local building and zoning codes.

The Illinois Supreme Court likewise held that the Corridor Protection Statute did not violate the Due Process Clause. In this regard, the Court failed to address the stated purpose of the statute or its obvious effects. Instead, the Court declared it was not a zoning ordinance. (App. at 19). Insofar as Petitioners may have suffered a depression of land values, the Court found this to be an " . . . unavoidable consequence of the public announcement that a highway **will** be built." (App. at 19). (Emphasis added).

As a final matter, the Illinois Supreme Court found that the statute at issue does not violate the Separation of Powers Doctrine. (App. at 15). Here, the Court found that the Corridor Protection Statute did not change any requirement of the State establishing a public need prior to commencing an eminent domain action. Left unaddressed in the Court's analysis was how the State could make a determination of a public need – not on a proposed public project – but rather upon the development plans of a private property owner within the map of reservation.

ARGUMENT

I. The Illinois Corridor Protection Statute Violates the Takings Clause

A. Introduction

Although each Illinois court upheld the constitutionality of the Corridor Protection Statute, all of the tribunals did so for different reasons. The circuit court held that to

the extent Petitioners had any constitutional challenge, they were without standing to make that challenge (App. at 38). The appellate court, on the other hand, acknowledged that Petitioners had standing. (App. at 29-30). Directing its attention to the substance of the statute, the appellate court held that the Corridor Protection Statute was somehow procedural, and that it in no way amounted to a taking. (App. at 35). Indeed, the appellate court found that Petitioners' arguments were premature in that the State had not done anything to actually assert control over the Petitioners' property (App. at 35). The Illinois Supreme Court found that the Corridor Protection Statute did have a regulatory impact, but it was so negligible so that no taking had occurred. Here, the final arbiter of Illinois jurisprudence adopted the reasoning of a 1975 New Jersey case and held that the regulatory impact of the challenged provision amounted to a mere 165 days (App. at 11-13).

The decision rendered by the Illinois Supreme Court is noteworthy for what it failed to address. The Opinion and Order ignores the fact that the State has granted itself an involuntary servitude over private property for a time period which remains indefinite. Perhaps more egregiously, the Illinois Supreme Court Order omits any analysis as to whether the State may grant itself an option to take private property – especially where that option is clearly based upon the development plans of a private property owner rather than a tangible public project. Nor does the Illinois decision consider the fact the Corridor Protection Statute is devoid of any criteria under which the State will implement the legislation. The Petitioners have no inkling as to what type of private development would create a "present public need" whereby the State would exercise its option to take. Finally, the Illinois

courts never once analyzed, discussed or recognized the plain and obvious purpose of the Illinois Corridor Protection Statute.

B. Statement of Importance

The instant case is one of first impression. Petitioners have been unable to locate any reported decision by this Court or any other federal case which examines the constitutionality of a State's exercising an option to take property in order to secure land for a proposed but uncertain right-of-way. For the reasons set forth herein, this regulatory framework, which has been adopted and used in at least two states, should be adjudicated and held unconstitutional.

As an initial matter, some states have considered this issue and have reached various results. See *Davis v. Brown*, 221 Ill.2d 435 (Ill. 2006); *Joint Ventures, Inc. v. Department of Transp.*, 563 So.2d 622 (Fla. 1990); *Palm Beach County v. Wright*, 641 So.2d 50 (Fla. 1994); *Kingston East Realty Co. v. State, By Commissioner of Transp.*, 336 A.2d 40 (N.J. 1975); *Lomarch Corp. v. Mayor and Common Council of City of Englewood*, 237 A.2d 881 (N.J. 1968). Of equal importance, these cases demonstrate a lack of reasoned analysis relative to what the State can and cannot do with regard to securing property for future transportation infrastructure. Without certiorari, the people of Illinois will be subjected to the State granting itself a possessory interest in real property for an unlimited time period at no cost to the government, but at great expense to those affected landowners. Because this principle contravenes the express holding of *Armstrong v.*

United States, 364 U.S. 40 (1960), certiorari should be granted.

C. The Purpose of the Corridor Protection Act is to Reduce the State's Future, Albeit Contingent, Land Acquisition Costs

A necessary element in analyzing whether a regulatory taking has occurred lies in the extent of the public interest that is accomplished coupled with the effect of the statute upon individual landowners. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922) (holding that where regulation goes too far, it will be recognized as a regulatory taking). Likewise, the character of the government action be scrutinized. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). It is well-settled that the Fifth Amendment bans the government from forcing some people alone to bear public burdens which, in fairness, should be borne by the entire public. *Armstrong v. United States*, 364 U.S. 40 (1960).

Petitioners submit that the sole reason for the "option to take" within the challenged provision is to control the Petitioners' property for an indefinite period of time and reduce the cost of future land acquisition. This is not a conclusion, nor has it been disputed by the State. The statute memorializes this fact.

> The Department may establish presently the approximate locations and widths of rights of way for future additions to the State Highway System **to inform the public and prevent costly and conflicting development of the land involved.** (Emphasis added).

605 ILCS 5/4-510

A simple letter to each landowner would serve to inform the public. So, too, would recording the map, a feature the Act requires. The remainder of the statute, by its explicit language, seeks to prevent development which, presumably, the State anticipates will be "costly". That which the State determines to be costly remains undefined, but common sense, along with the unambiguous goal of the Act, clearly results in the freezing of improvements so as to marginalize otherwise escalating property values. The State has granted itself the power to control the highest and best use of property within the map of reservation. There is a cost to this policy, and that cost is borne by a small amount of people (the Petitioners) theoretically for the benefit of the entire public. The requirement that Petitioners notify IDOT of proposed improvements coupled with IDOT's ability to then decide whether to condemn the property can only be attributed to cost savings. Since the State already has condemnation powers and, indeed, quick-take authority, the only reason to implement this option to take lies in the potential future savings. No rational theory could attribute these powers to informing the public, especially where a map of reservation has already been recorded.

Other States have considered and struck down virtually identical measures which freeze property values in contravention of the Due Process Clause. Various courts have held that when an ordinance or regulation is imposed to depress property values and minimize the costs of acquiring such property by condemnation in the future, that regulation is violative of the constitutional prohibition against deprivation of property without due process of law, constitutes a regulatory taking, or both. *Robertson v.*

Salem, 191 F.Supp. 604 (DC Or. 1961); *Tallahassee Bank & Trust Co.*, 108 So.2d 74 (Fla. App. 1958); *Carl M. Freeman Associates, Inc. v. State Roads Commission*, 252 Md. 319, 250 A.2d 250 (1969); *Henle v. Euclid*, 97 Ohio App. 258, 125 N.E.2d 355 (1954); *State ex rel. Sun Oil Company v. Euclid*, 130 N.E.2d 336 (Ohio 1955); *Roer Construction Corporation v. New Rochelle*, 207 Misc. 46, 136 N.Y.S. 2d 414 (1954); *State ex rel. Willey v. Griggs*, 89 Ariz. 70, 358 P.2d 174 (Ar. 1960); and *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993 (1st Cir. 1983).

In *Robertson v. Salem*, 191 F.Supp. 604 (DC Or. 1961), the State desired to acquire certain property around the capitol and directed the City of Salem to zone said areas appropriately. The Petitioner, a property owner in the district, sued the City of Salem when the municipality precluded any business use within the district. Petitioner alleged that the City abused its power and that the ordinance did nothing to secure the public welfare. The court agreed with the Petitioner. In its analysis, the court determined that the motivation for the statute was to depress land values for the State's future acquisition. In finding that the general welfare of Salem residents had no relation to the statute, the court held that the effect of the statute was to freeze land use within the district. Accordingly, the court concluded that the statute was an attempt by Salem to use its police power to take Petitioner's property in violation of due process and without just compensation.

The instant case remains an even more egregious violation of the Due Process Clause. Here, the State has bypassed any directive that local government impose zoning restrictions and has unequivocally usurped that authority. Under the Illinois statute, a local property

owner cannot incur "any development costs", which includes retaining professionals to evaluate a possible rezoning. Given the unambiguous language of the Corridor Protection Statute, a Petitioner would be precluded from retaining an architect prior to constructing an addition to her home without seeking approval from IDOT. There is no question that the Corridor Protection Statute empowers IDOT to engage in, and to supersede, local zoning and land use powers otherwise granted by the Illinois Municipal and County Codes and in effect for all similarly situated landowners. Any of the Petitioners could develop their property in accordance with the local jurisdictional authority and have that approval vetoed by the State for a roadway which may or may not be built in the future. Such a provision has no relation to any legitimate governmental interest and should be stricken down as unconstitutional.

Likewise, in *Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Company*, 108 So.2d 74 (Fla. App. 1958) the court found zoning restrictions imposed by a condemning authority to be unconstitutional because the zoning restriction had been imposed to avoid an increase in the cost of acquiring the property. The critical feature of this case remains that the court struck down the regulations because the regulation was enacted to depress land values and save the State money.

In *Carl M. Freeman Associates, Inc. v. State Roads Commission*, 252 Md. 319, 250 A.2d 250 (1969), the court confronted the issue of a "freezing statute" with the constitutional right of a property owner to receive just compensation for his property. In *Freeman*, a county ordinance precluded the rezoning of any property within a proposed highway corridor. The court struck it down

finding that an ordinance had no public benefit, but was rather a transparent device to freeze property values relative to the ability to purchase land at reduced prices for future roadways.

In *Henle v. Euclid*, 97 Ohio App. 258, 125 N.E.2d 355 (1954), the Petitioner owned a parcel which a contract purchaser wished to develop into a gasoline station. However, a zoning change was needed. Although there were no objections, the city denied the petition based upon the fact that a highway was *proposed* and Petitioner's parcel would *potentially* be needed. The trial court entered judgment for the Petitioner and directed that she be permitted to file an application for construction of a gasoline station. The appellate court, in affirming the judgment, rejected the claim that the city had the right to "freeze" the Petitioner's property, preventing her from its beneficial use until the city got around to appropriating it for public purposes as a part of the freeway. The court held that the proposed freeway was tentative in character, and the construction of the freeway had not reached the stage compelling the city to appropriate the Petitioner's property. Moreover, the Court held that the Petitioner was not required to maintain her property and pay taxes without benefit until the development reached the stage, if it ever did, where there was a public need for her property to be taken for freeway purposes. It is difficult to fathom a more similar case to the one at bar. In the present controversy, IDOT has acknowledged that the road at issue may never be built. Moreover, if it is constructed, it may not commence for another 20 years. At the very least, there are several years of studies to be undertaken. The question is: why is IDOT, by virtue of the statute, an arbiter of local land improvement? There can only be one reason, and that

is to "prevent costly development of the land involved" in the future. Accordingly, 605 ILCS 5/4-510 remains unconstitutional.

In a follow-up case to *Henle*, *State ex rel. Sun Oil Company v. City of Euclid*, 164 Ohio St. 265, 130 N.E.2d 336 (1955), the appellate court again struck down a governmental attempt to manipulate private property rights regarding an alleged future interest of the public. Having failed to freeze the use of Petitioner's property via zoning, the City attempted to acquire the parcel by eminent domain. The court held that the City's attempt was defective because no such ordinance establishing the freeway within the respondent city had been adopted by the city council, and that the freeway was still in a visionary stage awaiting an intergovernmental agreement with the county, state, or federal government. The court held that the resolution adopted by the city council declaring it necessary to appropriate the property in question for highway purposes, and a later ordinance enacted by that body declaring that the property had been appropriated were abortive attempts to acquire title to the lot in question for future highway purposes. The city had no power or authority to appropriate lands for some contemplated future use. The statement in the *Henle* opinion to the effect that the city could not freeze the property in question preventing its beneficial use until the city got around to appropriating it for public purposes as a part of the freeway is equally applicable to the facts and issues of the present case. Yet this is exactly the type of regulatory action sanctioned by the Illinois courts.

The case law cited in these jurisdictions on these issues remains instructive. The filing of a reservation map is not, in and of itself, a *per se* taking. *Rieder v. State*

Department of Transportation, 221 N.J.Super. 547, 535 A.2d 512 (N.J.Super.App.Div. 1987). But when a map is combined with restrictions on the use of the land designated as a highway corridor or future right-of-way, liability attaches. *Joint Ventures, Inc. v. Department of Transp.*, 563 So.2d 622 (Fla. 1990). In the case at bar, there is no question that the Illinois Corridor Protection Statute contains overreaching land use restrictions. Clearly, the Petitioners must obtain IDOT's consent prior to undertaking *any* development save for emergency repair.

The Illinois Supreme Court acknowledged that there exists a well-established line of authority which holds that it is " . . . an illegitimate state interest to purposefully depress property values in anticipation of future land acquisition." (App. at 17). However, the same Court held that the Corridor Protection Statute " . . . is not a zoning regulation and the acquisitions of land is not a hidden or ulterior motive behind the statute." (App. at 19). Yet the instant provision is far more powerful than a mere zoning restriction. The plain and obvious powers of the statute preempt local zoning and building codes. When the statute forbids any property owner from incurring any development costs, it effectively precludes a permit application of any kind. Technically, the Illinois Supreme Court is correct when it holds that the Corridor Protection Statute is not a zoning ordinance, but the legal effect is the same, if not more powerful than illegal spot zoning. There can be no doubt that the State has efficiently usurped all local authority by virtue of legislation fiat.

Nevertheless, the Illinois Supreme Court held that " . . . there is no indication that Section 4-510 was enacted as a means to purposefully and improperly drive down the value of landowners' properties." (App. at 19). This conclusion

is devoid of any reasoning. In fact, the stated purpose of the provision is to avoid costly development. Under this regulatory scenario, any private property owner desiring to improve his or her property or rezone must, prior to incurring any cost, notify the State. The State then has the option to take. There is simply no other reasonable explanation for this provision other than to save the State money, especially where eminent domain authority and quick-take powers already exist. Accordingly, the conclusion of the Illinois Supreme Court should be reversed.

D. The Opinion and Order of the Illinois Supreme Court is Erroneous as a Matter of Law

In its due process analysis, the Illinois Supreme Court held that "[t]o the extent that such a map works to depress the value of land within a right-of-way, this is simply the unavoidable consequence of the public announcement that a highway will be built". (App. at 19). The Petitioners never objected to the map of reservation. The recording of a map of reservation informs the public, as it should, that a highway may be sited in a certain location. More importantly, this analysis remains woefully incomplete. It is the second prong, the option to take property, to which the Petitioners object. Moreover, the aforementioned quote from the Illinois Supreme Court is premised on the erroneous foundation that the highway will be constructed. That the State wants to build a highway sometime in the future is obvious; whether it ever will remains uncertain. Indeed, if the State were certain to build this highway, this statute would never come into play because the State would institute eminent domain where it could not successfully negotiate the purchase of real property. In the

interim, if a highway is ever built, the State has effectively forbidden any improvements or rezoning subject only to its unfettered discretion.

In its regulatory takings analysis, the Illinois Supreme Court made its most illogical finding. Here, the Court held that the regulatory impact exists for a period of 165 days. (App. at 11). In doing so, the Court limited the entire effect of the statute to be that time where the State was compelled to act. This analysis fails to consider the obvious legal ramifications of the Act. Once the State invokes the statute, as it did in July of 2002, a private property owner cannot incur any development or rezoning costs until it notifies, and receives approval from, the State. To hold that the cumulative effect of this provision is limited to that period in which the State must act can only be characterized as irrational. Unlike millions of other property owners within the State of Illinois, the Petitioners cannot retain land planners, an architect, an attorney or an engineer. He or she cannot incur any costs, and this prohibition has no timeframe. Theoretically, the State could impose this prohibition for 25 years and then, having failed to build the highway, release the Petitioners from the State's involuntary servitude. That the Illinois Supreme Court held the regulatory impact to be only for a 165-day period ignores the plain and obvious effects of the challenged statute.

In support of this aspect of its decision, the Illinois Supreme Court relied upon an entirely different New Jersey statute. In the New Jersey case relied upon by the Illinois Supreme Court, the Petitioner clearly had the ability and did, in fact, apply for a building permit. *Kingston East Realty Company v. State*, 133 N.J.Super. 234, 336 A.2d 40, 42 (1975). There were other provisions, such

as compensation for relocation within the New Jersey Statute which the appellate court found that " . . . the statute . . . provides redress for aggrieved persons." 336 A.2d at 46. Undoubtedly, the New Jersey legislation was far less intrusive than the challenged provision at bar.

Yet, there remain similarities. As recognized by the *Kingston* Court:

> " . . . the actions of the State in this case under N.J.S.A. 27:7-67 constituted a restriction upon the use of plaintiff's property, which can be analogized to an option to purchase since its imposition was to enable the State, during the period of its existence, to determine whether or not to acquire the property for a public purpose."

336 A.2d at 45.

This is the real issue; the New Jersey Court implicitly accepted the State's power to exercise an option to purchase (and/or take), "during the period of its existence." Putting aside the fact that the New Jersey law allowed for property owners to incur development costs and to initiate permit applications, the legal issue involved in *Kingston* and the case *sub judice* necessitates a determination as to whether the State can ever exercise an option based upon the development or rezoning plans of a private property owner. In the private sector, any similar arms-length option would cost money, the consideration being the ability to purchase the property prior to its alteration. Open space advocates, for example, may wish to pay a developer not to build and subdivide. Towards that end, the extent of the development would determine the cost of the option. These issues were never addressed by the Illinois Supreme Court and were glossed over by the New Jersey appellate court. But this case involves the determination of

that legal question. Can the State grant itself an option to purchase and/or take property based upon the development plans of a private property owner at no cost, and for an unlimited duration, when the anticipated public project may never materialize?

In *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), the U.S. Supreme Court recognized that state regulations can, in and of itself, amount to a taking. Writing for the Court, Justice Holmes stated:

> As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

260 U.S. at 394.

This principle has been reaffirmed in later U.S. Supreme Court decisions. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). The *Penn Central* Court noted that regulatory taking analysis does not have any set formula, but instead turns upon the magnitude of the regulation's economic impact and the degree to which it interferers with legitimate property interests. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S.Ct. 2074 (2005). At issue remains the character of the government action, whether or not the common public good is promoted and the scope of the regulation. *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448 (2001). Whether a regulatory taking has occurred is dependent

upon whether the government has directly appropriated private property or ousts an owner from his own domain. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2286 (1992). Because the provision at issue unequivocally appropriates Petitioners' property, the Illinois Corridor Protection Statute runs afoul of the Takings Clause. Accordingly, the Supreme Court should grant certiorari and reverse the judgment of the Illinois Supreme Court.

II. The Illinois Corridor Protection Statute Violates the Due Process Clause

In addition to its unconstitutional regulatory impact, the Illinois statue contains two other fatal defects. 65 ILCS 5/4-510 adds an entirely new layer to the law of eminent domain. In contravention of established case law, there is no longer a required legislative finding of a public need. Instead, the statute affords the State an insurance policy. Public need or public purpose is no longer the proposed highway; the public purpose is to save money for future, albeit contingent, land acquisitions. The statutory framework of the Corridor Protection Statute provides for the development or rezoning plan of a private landowner to somehow create a public need which did not heretofore exist. Since the triggering mechanism for the eminent domain power has nothing to do with the proposed public project, the legislation has exceeded its constitutional boundaries.

It is well-settled that in order to confiscate private property in conformance with the Fifth Amendment, the taking must be for a public use. *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 123 S.Ct. 1406 (2003);

Kelo v. City of New London, Conn., 545 U.S. 469, 125 S.Ct. 2655 (2005). Likewise, in Illinois, it is fundamental that a determination of public need remains a prerequisite for an eminent domain action to be constitutional. *People ex rel. Director of Finance v. YMCA of Springfield*, 86 Ill.2d 219, 427 N.E.2d 70 (Ill. 1981). Either a public need exists or it does not. Whether or not a private landowner desires to rezone or add improvements her property cannot, as a matter of law, be the catalyst for a determination of public need. This analysis leads back to the purpose of the statute; that is, to save money for future land acquisitions. Indeed, saving the public money remains the only viable public purpose of the Illinois Corridor Protection Statute.

Assuming, arguendo, that future savings to the public somehow constitutes a public use, this particular legislation runs afoul of *Armstrong v. United States*, 364 U.S. 40 (1960). Although based upon a different fact pattern, the *Armstrong* Court held that:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

364 U.S. at 49.

The legal principle articulated in *Armstrong* is directly germane to the instant controversy. Here, forty-seven Petitioners have had their property rights frozen across three counties where hundreds of thousands of citizens remain totally unaffected. Ostensibly, all of those nearby will benefit but the burden is borne by the Petitioners. Because this legislation clearly violates the

principle articulated by *Armstrong v. United States*, 364 U.S. 40 (1960), it is unconstitutional.

There is yet another due process problem with the Illinois statue at bar, which remains the complete lack of any standards or criteria which may trigger the State's option to take. This unfettered delegation of power conferred by the Illinois General Assembly to its Department of Transportation remains arbitrary and capricious on its face. A Petitioner under the jurisdiction of the Illinois Corridor Protection Statute has absolutely no idea what type of proposed improvements will cause the State to exercise its option to institute eminent domain. This, too, renders the statute unconstitutional.

In Illinois, this unfettered discretion and lack of any intelligible criteria would be void as violative of the separation of powers doctrine. *In re Application for Judgment and Sale of Delinquent Properties for Tax Year 1989*, 167 Ill.2d 161, 656 N.E.2d 1049 (Ill. 1995); *Village of Lombard v. Pollution Control Board*, 66 Ill.2d 503, 363 N.E.2d 814 (Ill. 1977); *People ex rel. Colletti v. Pate*, 31 Ill.2d 354, 201 N.E.2d 390 (Ill. 1964). In the federal context, however, arbitrary discretion as it pertains to congressional delegation is analyzed within a due process umbrella.

Notwithstanding its characterization, the federal courts have also struck down a blanket grant of authority. *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001). In *Whitman*, this Court held:

> In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, Section 1, of the Constitution vests [a]ll legislative Powers herein granted . . . in a Congress of the United

States. This text permits no delegation of those powers, *Loving v. United States*, 517 U.S. 748, 771, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996); see id., at 776-777 (SCALIA, J., concurring in part and concurring in judgment), and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928). We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. Both *Fahey v. Mallonee*, 332 U.S. 245, 252-253, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947), and *Lichter v. United States*, 334 U.S. 742, 783, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948), mention agency regulations in the course of their nondelegation discussions, but *Lichter* did so because a subsequent Congress had incorporated the regulations into a revised version of the statute, *ibid.*, and *Fahey* because the customary practices in the area, implicitly incorporated into the statute, were reflected in the regulations, 332 U.S., at 250, 67 S.Ct. 1552. The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise – that is to say, the prescription of the standard that Congress had omitted – would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.

531 U.S. at 472-473.

In the case at bar, there is no doubt that the Illinois General Assembly has granted IDOT the power to institute eminent domain, sporadically and in its sole discretion, upon development plans unrelated to any publicly funded project. Assuming that this methodology somehow survives constitutional muster, the delegation involves no intelligible principles, and is therefore void. Completely absent within the Corridor Protection Statute are any criteria by which the State can implement its alleged authority. As a matter of law, IDOT cannot cure its unconstitutionally delegated power. For this reason too, the Illinois Corridor Protection Act is unconstitutional.

WHEREFORE, Petitioners, pray that this Court consider the issues raised herein and grant Plaintiffs' Petition for Certiorari.

Respectfully submitted,

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August 2006

Docket No. 100624.

**IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS**

MARVEL DAVIS *et al.*, Appellants,
v. KIRK BROWN *et al.*, Appellees.

Opinion filed June 2, 2006.

JUSTICE McMORROW delivered the judgment of the court, with opinion.

Chief Justice Thomas and Justices Freeman, Fitzgerald, Kilbride, Garman, and Karmeier concurred in the judgment and opinion.

OPINION

(Filed Jun. 2, 2006)

Section 4-510 of the Illinois Highway Code (605 ILCS 5/4-510 (West 2004)) authorizes the Illinois Department of Transportation to prepare and record maps that "establish presently the approximate locations and widths of rights of way for future additions to the State highway system." Pursuant to this statute, the Department of Transportation prepared and recorded a map that set forth a right-of-way for a proposed highway, known as the Prairie Parkway, located in northern Illinois. Plaintiffs, over 40 landowners whose property falls within the right-of-way, filed an action for declaratory judgment, seeking to have section 4-510 declared unconstitutional. The circuit court of Kendall County dismissed plaintiffs' complaint, primarily

on the basis that plaintiffs had not shown any injury and, therefore, lacked standing. On appeal, the appellate court reversed the circuit court's judgment that plaintiffs lacked standing, but rejected plaintiffs' constitutional arguments on the merits. 357 Ill. App. 3d 176. For the reasons that follow, we affirm the judgment of the appellate court.

BACKGROUND

On October 14, 2003, plaintiffs filed a second amended complaint for declaratory relief in the circuit court of Kendall County. In their complaint, plaintiffs alleged the following. In 1999, the defendants, the Illinois Department of Transportation and its then-director, Kirk Brown[1] (collectively, the Department), began feasibility studies for a proposed highway that would connect Interstate 80 with Interstate 88 in northern Illinois. The proposed highway, which was named the Prairie Parkway, would run north and south through portions of Kendall, Kane and Grundy Counties.

Under the enabling authority granted by section 4-510 of the Illinois Highway Code (605 ILCS 5/4-510 (West 2004)), the Department began preparing a map to establish a right-of-way for the Prairie Parkway. A public hearing was held on December 11, 2001, at which time testimony was heard regarding various proposed locations for the right-of-way. Sometime after the hearing, the Department selected a right-of-way and completed a final

[1] The current director of the Illinois Department of Transportation is Timothy Martin. He is substituted for Kirk Brown as a defendant in this action. See 735 ILCS 5/2-1008(d) (West 2004).

map. The map was filed with the relevant county authorities on July 31, 2002.

As required by section 4-510, the Department notified those landowners with property in the Prairie Parkway right-of-way, including plaintiffs, that the final map had been approved and filed. After receiving notice, plaintiffs commenced the present action.

Plaintiffs' second amended complaint challenges the constitutionality of section 4-510. In relevant part, section 4-510 provides:

> "The Department may establish presently the approximate locations and widths of rights of way for future additions to the State highway system to inform the public and prevent costly and conflicting development of the land involved.
>
> * * *
>
> The Department shall make a survey and prepare a map showing the location and approximate widths of the rights of way needed for future additions to the highway system. The map shall show existing highways in the area involved and the property lines and owners of record of all land that will be needed for the future additions and all other pertinent information. Approval of the map with any changes resulting from the hearing shall be indicated in the record of the hearing and a notice of the approval and a copy of the map shall be filed in the office of the recorder for all counties in which the land needed for future additions is located.
>
> Public notice of the approval and filing shall be given in newspapers of general circulation in all counties where the land is located and shall

be served by registered mail within 60 days thereafter on all owners of record of the land needed for future additions.

* * *

After the map is filed and notice thereof given to the owners of record of the land needed for future additions, no one shall incur development costs or place improvements in, upon or under the land involved nor rebuild, alter or add to any existing structure without first giving 60 days notice by registered mail to the Department. This prohibition shall not apply to any normal or emergency repairs to existing structures. The Department shall have 45 days after receipt of that notice to inform the owner of the Department's intention to acquire the land involved; after which, it shall have the additional time of 120 days to acquire such land by purchase or to initiate action to acquire said land through the exercise of the right of eminent domain. When the right of way is acquired by the State no damages shall be allowed for any construction, alteration or addition in violation of this Section unless the Department has failed to acquire the land by purchase or has abandoned an eminent domain proceeding initiated pursuant to the provisions of this paragraph." 605 ILCS 5/4-510 (West 2004).

Plaintiffs' complaint is in three counts. Count I, though captioned "violation of due process," is more accurately read as alleging a takings clause violation. As the Department noted in its memorandum of law in response to plaintiffs' second amended complaint, "[u]nderlying/permeating Count I is the notion that the Defendants improperly used the sovereign's police powers,

resulting in a regulatory taking." Specifically, plaintiffs allege in count I that under section 4-510, those landowners whose property falls within the right-of-way established by a map must give notice to the Department if they plan to develop their property; that once a landowner has so notified the Department, the Department has the option to commence eminent domain proceedings against the landowner; that this "option to take" has "no time constraints"; and that no compensation is provided to landowners under the statute for the creation of the "option to take". Two plaintiffs, Marvel Davis and Rojean Gum, further allege in the complaint that they would like to develop their property but have not done so for fear that if they give notice to the Department, as required by section 4-510, the Department will commence eminent domain proceedings against them.

In count II of their complaint, plaintiffs allege that section 4-510 violates separation of powers principles. Plaintiffs allege that under the state constitution, as interpreted by this court, a showing of necessity must be made before the power of eminent domain may be lawfully exercised. According to plaintiffs, section 4-510 negates this requirement, thus effectively changing "the judicial interpretation of the Illinois Constitution by way of legislative fiat" in violation of the separation of powers clause of the state constitution.

Finally, in count III, plaintiffs allege that section 4-510 violates principles of substantive due process. Plaintiffs contend that section 4-510 "is an attempt by the State to freeze property values in anticipation of possible, future land acquisitions" and, as such, is "an impermissible exercise of the State's police power".

After plaintiffs filed their second amended complaint, the Department filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2004)). The circuit court granted this motion, primarily on the ground that the plaintiffs had not yet been injured by section 4-510 and so had no standing to pursue their action for declaratory judgment. On appeal, the appellate court reversed the circuit court's judgment with respect to standing. The appellate court concluded that plaintiffs had sufficiently pled a threatened injury to their interests so as to meet the pleading requirements necessary to maintain an action for declaratory relief. Having reached this conclusion, the appellate court then accepted plaintiffs' invitation to reach the merits of their facial challenges to the constitutionality of section 4-510. Citing to *Shortridge v. Sherman*, 84 Ill. App. 3d 981, 986 (1980), the appellate court noted that it had the authority to render any judgment that ought to have been made in the circuit court (see 155 Ill. 2d R. 366(a)(5)), and that plaintiffs' facial challenges to the validity of section 4-510 could be addressed on appeal because they presented pure questions of law. Effectively treating the case as if the parties had filed cross-motions for summary judgment, the appellate court rejected plaintiffs' arguments and upheld the facial validity of section 4-510. We subsequently granted plaintiffs' petition for leave to appeal. 177 Ill. 2d R. 315.

ANALYSIS

At the outset, we note that neither party to this appeal contests the appellate court's decision to reach the merits of plaintiffs' facial challenges to the constitutionality of section 4-510. Further, the Department concedes

that both Marvel Davis and Rojean Gum, the two plaintiffs who allege that they have forgone developing their property because of a fear that the Department will begin eminent domain proceedings, have standing to contest the facial validity of section 4-510. Accordingly, the only matter at issue before this court is the appellate court's judgment that section 4-510 is facially constitutional.[2]

Statutes are presumed constitutional. *Arangold Corp. v. Zehnder,* 187 Ill. 2d 341, 351 (1999). The party challenging the validity of a statute has the burden of rebutting this presumption and clearly establishing a constitutional violation. *In re R.C.*, 195 Ill. 2d 291, 296 (2001). Moreover, "'it is our duty to construe acts of the legislature so as to uphold their constitutionality and validity if it can reasonably be done, and, further, that if their construction is doubtful, the doubt will be resolved in favor of the validity of the law attacked.' [Citations.]" *People v. Inghram*, 118 Ill. 2d 140, 146 (1987).

Plaintiffs contend that section 4-510 is facially invalid under three constitutional provisions: the takings clause of the federal constitution, the separation of powers clause of the state constitution and the due process clause of the state constitution. In raising these facial challenges, plaintiffs

"must overcome considerable hurdles:

> 'A facial challenge to a legislative Act is, of course, the most difficult challenge to mount

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[2] The Department also asks this court to hold that, aside from Davis and Gum, no other plaintiff has standing to challenge the facial validity of section 4-510. In light of our holding that section 4-510 is constitutional on its face, this issue need not be considered here.

> successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.'" *In re C.E.*, 161 Ill. 2d 200, 210-11 (1994), quoting *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707, 107 S. Ct. 2095, 2100 (1987).

Because the appellate court's judgment that section 4-510 is constitutional on its face involves only questions of law, our review is *de novo*. *In re R.C.*, 195 Ill. 2d at 296.

Takings Clause

The takings clause of the fifth amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const., amend. V. The takings clause is made applicable to the states through the fourteenth amendment. *Chicago, Burlington, & R.R. Co. v. City of Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897).

The clearest example of a taking which requires just compensation under the fifth amendment "is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 161 L. Ed. 2d 876, 887, 125 S. Ct. 2074, 2081 (2005). However, the Supreme Court has recognized that

> "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster-and that such 'regulatory takings' may be

> compensable under the Fifth Amendment. In Justice Holmes' storied but cryptic formulation, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 326, 43 S. Ct. 158, 160 (1922).] The rub, of course, has been – and remains – how to discern how far is 'too far.'" *Lingle*, 544 U.S. at 537-38,161 L. Ed. 2d at 887, 125 S. Ct. at 2081.

The general principles to be applied in determining whether a regulation goes "too far," and thus becomes a taking, are found in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). In *Penn Central*, the Supreme Court observed that, although there was no "'set formula'" to apply to regulatory-takings claims, there are "several factors that have particular significance." These factors include "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124, 57 L. Ed. 2d at 648, 98 S. Ct. at 2659. In addition, the "'character of the governmental action' – for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good' – may be relevant in discerning whether a taking has occurred." *Lingle*, 544 U.S. at 539, 161 L. Ed. 2d at 888, 125 S. Ct. at 2082, quoting *Penn Central*, 438 U.S. at 124, 57 L. Ed. 2d at 648, 98 S. Ct. at 2659. See also *Lingle*, 544 U.S. at 540, 161 L. Ed. 2d at 889-90, 125 S. Ct. at 2082 ("the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic

impact and the degree to which it interferes with legitimate property interests").

In the case at bar, plaintiffs concede that the mere filing of a map setting forth a right-of-way does not, by itself, constitute a regulatory taking. See, *e.g.*, *City of Chicago v. Loitz*, 61 Ill. 2d 92, 97 (1975) ("mere planning or plotting in anticipation of a public improvement does not constitute a 'taking' or damaging of the property affected"); *Bauman v. Ross*, 167 U.S. 548, 596, 42 L. Ed. 270, 290, 17 S. Ct. 966, 984 (1897); see generally J. Kemper, Annotation, *Plotting or Planning in Anticipation of Improvement as Taking or Damaging of Property Affected*, 37 A.L.R. 3d 127, 132 (1971). Plaintiffs contend, however, that section 4-510 does more than just authorize the filing of a right-of-way map. Plaintiffs point out that, under section 4-510, once a landowner notifies the Department of any development plans, the Department is granted what is, in effect, an "option to take" the landowner's property. Further, no compensation is provided the landowner under the statute for the option. In plaintiffs' view, it is this "option to take" that "contains the hook which amounts to a regulatory taking."

The Department, however, maintains that section 4-510 imposes no economic restrictions on any landowner's property. According to the Department, section 4-510 "neither involves a physical invasion of property, nor deprives the plaintiffs of any economically beneficial or productive use of theft land. * * * The statute merely requires that if a property owner, within the boundaries of a highway corridor map, desires to rebuild, alter, add to or make improvements to an existing structure, or to create a new structure, the Department must be given prior notice of such intention and the fair opportunity – if appropriate

– to acquire the property through voluntary purchase or through its eminent domain power."

The Department's contention that section 4-510 places no economic restriction on any landowner's property is incorrect. Once a landowner gives notice to the Department as required by section 4-510, the Department has 45 days to inform the landowner whether it intends to acquire the property. 605 ILCS 5/4-510 (West 2004). The Department then has an additional 120-day period either to purchase the property in a voluntary transaction or to initiate eminent domain proceedings. If the property is not acquired during this time, the landowner may proceed with development without restriction under the statute. However, during the time the Department decides what to do with the property – a reservation period that may last up to 165 days – development may not be pursued by the landowner. Thus, contrary to the Department's assertions, there is a potential economic restriction imposed on a landowner's property under section 4-510.

However, it has been held that such a restriction does not amount to a regulatory taking. In *Kingston East Realty Co. v. State*, 133 N.J. Super. 234, 336 A.2d 40 (1975), the New Jersey appellate court considered the effect of a statutory scheme similar to section 4-510. In that case, a landowner applied for a permit to develop its property. Because the property fell within a highway planning map, the landowner could not be granted a permit under the applicable New Jersey law without first obtaining permission from the commissioner of the state department of transportation. As with section 4-510, the commissioner had, in total, as much as 165 days either to acquire the property voluntarily or to commence an action to condemn the property. *Kingston East Realty Co.*, 133

N.J. Super. at 241, 336 A2d at 43-44. Ultimately, the commissioner took no action against the landowner's property. The landowner thereafter contended that the time during which the commissioner reviewed the matter, and a building permit was withheld, constituted a taking for which it was entitled to compensation. *Kingston East Realty Co.*, 133 N.J. Super. at 242, 336 A.2d at 44.

The New Jersey appellate court rejected this argument. The court acknowledged that the actions of the state in the case "constituted a restriction upon the use of plaintiff's property, which can be analogized to an option to purchase since its imposition was to enable the State, during the period of its existence, to determine whether or not to acquire the property for a public purpose." *Kingston East Realty Co.*, 133 N.J. Super. at 243, 336 A.2d at 45. Nevertheless, the court concluded that the restriction did not amount to a taking. In so holding, the court emphasized both the beneficial policy behind the reservation period and its limited time frame:

> "[T]he period during which plaintiff was unable to secure a building permit was substantially less than the one year period involved in [previous cases]. Moreover, the restriction thus imposed was reasonably designed to reduce the cost of public acquisitions. * * * [T]he legislation is based upon a salutary recognition by the State of its responsibilities for persons displaced by highway improvements. It seeks to minimize such economic injury and grave inconveniences by avoiding these consequences through a restriction against the physical improvement of affected property for a limited period of time * * * .
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> * * *

> * * * [T]he restrictions here are for a considerably lesser period time [than one year], and are not a blanket reservation. Under this statute, the Commissioner is required to act affirmatively and promptly – by making a decision initially with [sic] 45 days and then, if need be, taking specific action within 120 days – in order to conclude the questions of whether the land is to be acquired for transportation purposes. These statutory steps are designed to provide some assurance that the temporary restriction upon the use of the property by the State shall be expeditiously and carefully reviewed and shall not last any longer than reasonably necessary to reach a sound decision on the need for the property for transportation purposes." *Kingston East Realty Co.*, 133 N.J. Super. at 243-44, 336 A.2d at 45.

We find the reasoning of the New Jersey appellate court persuasive. Applying that reasoning here, we conclude that under section 4-510 the limited reservation period which follows a landowner's notification to the Department does not constitute a regulatory taking.

Further, we note that even assuming, *arguendo,* that a 165-day reservation period could, in some instance, amount to a taking, plaintiffs have failed to demonstrate the facial invalidity of section 4-510. Plaintiffs "face an uphill battle in making a facial attack on [a statute] as a taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495, 94 L. Ed. 2d 472, 495, 107 S. Ct. 1232, 1247 (1987). To establish the facial invalidity of section 4-510, plaintiffs must show that the statue [sic] has an effect on the economic viability of every parcel of land that might fall under a right-of-way map. See *Hodel v. Virginia Surace Mining & Reclamation Ass'n*, 452 U.S. 264, 295, 69 L. Ed. 2d 1, 28, 101 S. Ct. 2352, 2370 (1981) (in a facial

takings challenge, the question is whether the "'mere enactment'" of the statute constitutes a taking). Plaintiffs have not met this standard.

Consider, for example, that those landowners located within a right-of-way map who never develop or alter their property will never be required to notify the Department under section 4-510. These landowners will not trigger the "option to take" provision of section 4-510 or the 165-day restriction period. For these landowners, the only effect of section 4-510 will be the creation and filing of the right-of-way map. And, as noted previously, the filing of a map, by itself, does not constitute a taking. See, e.g., *Loitz*, 61 Ill. 2d at 97. Given these facts, the most that can be said with respect to the facial impact of section 4-510, that is, the impact the statute has on every landowner in every right-of-way map, is that the statute creates the *possibility* of a 165-day reservation period. We cannot say, as a matter of law, that the mere potential of a 165-day reservation period amounts to a *per se* regulatory taking for every landowner who falls within a right-of-way map. Accordingly, we reject plaintiffs' facial takings challenge to section 4-510.

Separation of Powers

Plaintiffs contend that section 4-510 violates the separation of powers provision of the state constitution. That provision provides, with respect to the various branches of state government, that "[n]o branch shall exercise powers properly belonging to another." Ill. Const. 1970, art. II, §1.

Plaintiffs contend that it is the province of the courts, not the General Assembly, to interpret the state and

federal constitutions. Plaintiffs further emphasize that this court has required that there be a showing of "necessity" before the power of eminent domain may be constitutionally exercised. See, *e.g.*, *People ex rel. Director of Finance v. Young Women's Christian Ass'n of Springfield*, 86 Ill. 2d 219, 232-34 (1981). Plaintiffs maintain that section 4-510 "allows condemnation without any legislative finding of need." In plaintiffs' view, all that is required to condemn, under the authority of section 4-510, is a landowner's notification of development or alteration of its property. Thus, according to plaintiffs, section 4-510 violates the separation of powers provision because "the legislature cannot dispense with the constitutional requirement of necessity."

Contrary to plaintiffs' contentions, section 4-510 does not change the requirement that the Department must prove necessity to lawfully condemn property. Section 4-510 requires landowners in the right-of-way to give notice to the Department if they plan to develop or alter their properties. This notice is required to enable the Department to determine whether it wants to negotiate for the land, exercise eminent domain power, or refrain from taking any action. The notice requirement does not, however, alter eminent domain law. As the appellate court below observed, section 4-510 does nothing to reduce the obligations that the Department must satisfy if it is to lawfully condemn property. See also *Department of Transportation v. McGovern*, 103 Ill. App. 3d 461, 465 (1982) ("It is essential to observe that section 4-510 of the Illinois Highway Code is not a provision of the Eminent Domain Act"). Plaintiffs' contention that section 4-510 circumvents the requirements of eminent domain law is incorrect.

Plaintiffs further argue that, under section 4-510, the "standards and criteria by which the [Department] makes a determination to proceed with the taking process are non-existent." Citing to *In re Application for Judgment & Sale of Delinquent Properties for the Tax Year 1989*, 167 Ill. 2d 161, 176-77 (1995), plaintiffs maintain that section 4-510 "confers unfettered discretion upon an administrative agency" and, therefore, "constitutes an unlawful delegation of power by the legislature" in violation of separation of powers principles. We disagree.

The Department's eminent domain authority is established and governed by several provisions under the Highway Code, including, most notably, section 4-501 (605 ILCS 5/4-501 (West 2004)). Section 4-510 does nothing to alter the eminent domain requirements set forth in section 4-501 or any other provision of the Highway Code. These provisions provide the Department with constitutionally sufficient standards to govern its discretion. See also *Department of Transportation v. First Galesburg National Bank & Trust Co.*, 141 Ill. 2d 462, 466-68 (1990) (rejecting the argument that the Department's failure to adopt rules to guide its discretionary power to condemn land amounts to a due process violation). Accordingly, we reject plaintiffs' separation of powers claim.

Substantive Due Process

Plaintiffs also contend that section 4-510 violates principles of substantive due process. In cases that do not concern fundamental rights, such as the present one, a statute which is challenged as violating substantive due process need only survive rational basis review, *i.e.*, the

statute must bear a rational relationship to a legitimate state interest. *Tully v. Edgar*, 171 Ill. 2d 297, 304 (1996).

The Department maintains that section 4-510 is rationally related to numerous legitimate state purposes including, as the statute itself states, "inform[ing] the public" of the proposed highway by recording a map setting out its proposed path and preventing "costly and conflicting" land development. 605 ILCS 5/4-510 (West 2004). Plaintiffs, however, contend that section 4-510 is nothing more than "an attempt by the State to freeze property values in anticipation of possible, future land acquisitions" and, as such, is "an impermissible exercise of the State's police power."

As plaintiffs correctly note, there is a well-established line of authority, often addressing instances of spot zoning, which holds that it is an illegitimate state interest to purposefully depress property values in anticipation of future land acquisition:

> "In a number of instances it has appeared that although the zoning ordinances involved therein were ostensibly adopted in order to regulate land usage in the public interest, the real purpose for their enactment was to depress or limit property values in order to minimize the costs of acquisition of such property in anticipated condemnation proceedings. Where the evidence has been sufficient to establish such an ulterior motive, the courts have not been reluctant to declare such ordinances unconstitutional and void." J. Kemper, Annotation, *Eminent Domain: Validity of "Freezing" Ordinances or Statutes Preventing Prospective Condemnee From Improving, or Otherwise Changing, the Condition of His Property*, 36 A.L.R.3d 751, 755-56 (1971).

An Illinois case which illustrates this principle is *Galt v. County of Cook*, 405 Ill. 396 (1950). In *Galt*, the plaintiff's property adjoined North Avenue, a heavily traveled, four-lane road. The plaintiff's property had been zoned residential under a Cook County ordinance, despite the fact that the surrounding properties were predominantly commercial. Evidence at trial showed that the land was worth about $20 a front foot as zoned under the challenged ordinance, and would be worth from $150 to $300 if zoned for business uses. *Galt*, 405 Ill. 2d at 405. In addition, plaintiff's property was burdened with a special setback provision that forbid development within 130 feet of North Avenue, a distance far greater than customary. Evidence at trial established that the setback provision had been enacted specifically because of plans to widen North Avenue. The chairman of the commission which drafted the ordinance testified that the setback was "'in the interest of the public, [so] that when an improvement does come along as is planned in this case, the State or the county will not be obliged to pay excessively for removing improvements which are in the way of ultimate highway improvement.'" *Galt*, 405 Ill. at 402-03.

On appeal, this court struck down both the residential zoning and the setback provision. Noting the unusually large distance of the setback, the court determined that the setback provision was "unreasonable, capricious and discriminatory." *Galt*, 405 Ill. 2d at 405-06. In addition, this court stated:

> "Furthermore, the record makes it abundantly clear that the primary purpose of the special setback restriction was to hold down the cost of acquiring additional land for the widening of North Avenue and that this was to be accomplished at

> the expense of a few individual landowners. In both purpose and extent the restriction involved bears no perceptible relation to the public health, safety, comfort and general welfare. It destroys, rather than conserves, land values, and being designed to conserve public funds in the purchase of land, has, at the most, only a remote and incidental effect upon the reduction of traffic congestion. The chancellor correctly determined that the special setback restriction is unconstitutional and void in its application to plaintiffs' property." *Galt*, 405 Ill. at 406.

The present case is unlike *Galt* and the additional cases cited by plaintiffs. Section 4-510 is not a zoning regulation and the acquisition of land is not a hidden or ulterior motive behind the statute. To the contrary, a right-of-way map filed under section 4-510 provides a landowner with explicit notification that the Department may eventually seek to acquire their land. To the extent that such a map works to depress the value of land within a right-of-way, this is simply the unavoidable consequence of the public announcement that a highway will be built. And, clearly, the announcement of the building of a highway is not an impermissible governmental purpose. Unlike *Galt*, there is no indication that section 4-510 was enacted as a means to purposefully and improperly drive down the value of landowners' properties. For these reasons, we reject plaintiffs' facial, substantive due process claim.

CONCLUSION

Plaintiffs have failed to establish the facial invalidity of section 4-510. Accordingly, the judgment of the appellate court is affirmed.

Affirmed.

No. 2-04-0397

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARVEL DAVIS, JEFF HOLLAND, PHYLLIS PIERSON, STEVE MICHAEL, VIRGINIA SOUDERS, ROGER AND BLANCA SOUDERS, MENACHEM AND OMARJORIE ARDON, BRUCE RIEMENSCHNEIDER, DOUGLAS ZEIFHEIT AND NORMA ZEIFHEIT, ROJEAN GUM, CLARENCE R. MICHAEL, BURTON AND LOIS SCOTT, BYRON AND ROBERTA SCOTT, ROYCE AND MARILYN THOMPSON, HARRY SCHOGER, JAMES J. AND ROSEANN BUHLE, KATHRYN A. WEISS, RUTH A. LAWSON, DANIEL W. McKINNEY, LEONARD HANSEN, RONALD H. NAUMAN, HAROLD W. MARTI, BRUCE C. DEVICK, LOIS WEEKS, CHESTER SCOTT, THE POOR CLARES OF JOLIET, THE WAYNE PEACOCK FAMILY TRUST,	)	Appeal from the Circuit Court of Kendall County.
	)	No. 02-MR-50

JOSEPH J. RITCHIE, CHARLES ANZELEL, JR., LONNA MOELLERING (BOYCE FARM), BRUCE C. AND SHIRLEY L. THOMPSON, CHARLENE J. DAVIS, ANN L. BREEN, JEANENE SIPOS, PRISCILLA AND KENNETH W. JORSTAD, ELLEN BOLTE, AUSTIN S. WEEKS, VERA A. LONG, GERALD R. LONG, DOUGLASS H. LONG, REBECCA L. ALDRICH, KIRK FRIESTAD, JESSE DALE, CAROLE MONSON, NANCY McCARTHY, THE HEAP FAMILY PARTNERSHIP, AND MARY MOSS,

Plaintiffs-Appellants,

v.

KIRK BROWN AND THE DEPARTMENT OF TRANSPORTATION,

Defendants-Appellees

Honorable Leonard J. Wojtecki, Judge Presiding.

(Filed Apr. 13, 2005)

PRESIDING JUSTICE O'MALLEY delivered the opinion of the court:

Plaintiffs appeal the order of the circuit court of Kendall County dismissing their declaratory judgment action against defendants, Kirk Brown and the Illinois Department of Transportation (Department). In their

second amended complaint, plaintiffs sought to have section 4-510 of the Illinois Highway Code (Highway Code) (605 ILCS 5/4-510 (West 2002)) declared unconstitutional as improperly taking or interfering with plaintiffs' property without just compensation or due process of law. The trial court dismissed plaintiffs' complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2002)), holding that it failed to state a claim. On appeal, plaintiffs contend that their second amended complaint for declaratory relief properly stated a Claim sufficient to avoid dismissal under section 2-615 of the Code; substantively, plaintiffs contend that section 4-510 of the Highway Code violates due process by allowing the State to effect a taking of plaintiffs' property without just compensation. We affirm.

To provide an understanding of the issues raised by plaintiff, we first turn to the language of the provision at issue. Section 4-510 of the Highway Code provides:

> "The Department may establish presently the approximate locations and widths of rights of way for future additions to the State highway system to inform the public and prevent costly and conflicting development of the land involved.
>
> The Department shall hold a public hearing whenever approximate locations and widths of rights of way for future highway additions are to be established. The hearing shall be held in or near the county or counties where the land to be used is located and notice of the hearing shall be published in a newspaper or newspapers of general circulation in the county or counties involved. Any interested person or his representative may be heard. The Department shall evaluate the testimony given at the hearing.

The Department shall make a survey and prepare a map showing the location and approximate widths of the rights of way needed for future additions to the highway system. The map shall show existing highways in the area involved and the property lines and owners of record of all land that will be needed for the future additions and all other pertinent information. Approval of the map with any changes resulting from the hearing shall be indicated in the record of the hearing and a notice of the approval and a copy of the map shall be filed in the office of the recorder for all counties in which the land needed for future additions is located.

Public notice of the approval and filing shall be given in newspapers of general circulation in all counties where the land is located and shall be served by registered mail within 60 days thereafter on all owners of record of the land needed for future additions.

* * *

After the map is filed and notice thereof given to the owners of record of the land needed for future additions, no one shall incur development costs or place improvements in, upon or under the land involved nor rebuild, alter or add to any existing structure without first giving 60 days notice by registered mail to the Department. This prohibition shall not apply to any normal or emergency repairs to existing structures. The Department shall have 45 days after receipt of that notice to inform the owner of the Department's intention to acquire the land involved; after which, it shall have the additional time of 120 days to acquire such land by purchase or to initiate action to acquire said land

through the exercise of the right of eminent domain. When the right of way is acquired by the State no damages shall be allowed for any construction, alteration or addition in violation of this Section unless the Department has failed to acquire the land by purchase or has abandoned an eminent domain proceeding initiated pursuant to the provisions of this paragraph.

Any right of way needed for additions to the highway system may be acquired at any time by the State or by the county or municipality in which it is located. The time of determination of the value of the property to be taken under this Section for additions to the highway system shall be the date of the actual taking, if the property is acquired by purchase, or the date of the filing of a complaint for condemnation, if the property is acquired through the exercise of the right of eminent domain, rather than the date when the map of the proposed right-of-way was filed of record. The rate of compensation to be paid for farm land acquired hereunder by the exercise of the right of eminent domain shall be in accordance with Section 4-501 of this Code [(605 ILCS 5/4-501 (West 2002))]." 605 ILCS 5/4-510 (West 2002).

In September 2002, plaintiffs filed their original complaint for declaratory relief. Following dismissal of that complaint and their amended complaint for declaratory relief, plaintiffs filed their second amended complaint for declaratory relief. In this complaint, plaintiffs alleged that, in March 1999, defendants began a feasibility study pertaining to constructing a roadway to connect Interstates 80 and 88 in Kane, Kendall, and Grundy Counties. Defendants complied with the requirements of the Highway Code, holding a public hearing in December 2001

regarding the corridor the new roadway was to occupy. On July 31, 2002, defendants recorded a map showing the proposed roadway, pursuant to the requirements of section 4-510 of the Highway Code. Plaintiffs alleged that, before the map was finally created and recorded, defendants failed to carry out any needs analysis regarding whether the properties through which the proposed roadway was to travel needed to be condemned or purchased. Further, defendants repeatedly acknowledged that they did not know if the proposed road would be necessary in the future.

At some time after the December 2001 public hearing, but before the map was finalized and recorded, defendants changed the location of the planned roadway, adding 61 new properties to those that would be affected by the proposed road. Plaintiffs alleged that section 4-510 of the Highway Code prohibited them from developing or using their properties, essentially granting to the State an option to condemn by virtue of the provision requiring an owner to contact defendants first before initiating any development or use of the property affected by the reservation map. Moreover, plaintiffs specifically alleged that Marvel Davis and Rojean Gum had abandoned plans to construct improvements on their properties in light of the possibility that defendants would seek to condemn their properties upon notification.

Plaintiffs raised three counts in their second amended complaint. The first count alleged that section 4-510 violated due process in that it did not require that defendants make a determination that the land is necessary for the public good and, instead, granted an option to defendants to condemn the land at some indeterminate time in the future and gave no compensation for this option to any

plaintiffs. Count II alleged that section 4-510 of the Highway Code violated the separation of powers by eliminating the requirement of a finding of necessity before land is earmarked for use in a proposed roadway and thus improperly infringing on the judicial interpretation of the constitutional requirements necessary for the State to exercise its right of eminent domain. In count III, plaintiffs alleged that section 4-510 of the Highway Code operated as an improper attempt by defendants to freeze plaintiffs' property values at artificially low levels.

Defendants filed a motion to dismiss pursuant to section 2-615 of the Code, arguing that plaintiffs had not sufficiently pleaded any of the counts of the complaint under section 2-603 of the Code (735 ILCS 5/2-603 (West 2002)). The trial court agreed, holding:

> "The plaintiffs' second amended complaint adds nothing new to this case. It still contains the fatal defects set forth in the Court's previous orders. Even considering the Plaintiffs' constitutional arguments, they lack standing to make them. There is neither an injury nor an immediate danger of sustaining an injury to some legally cognizable interest at this state and there are no facts which have been pled which show that there is an actual controversy between adverse parties. The legislation complained of does not affect the Plaintiffs at this juncture except in the general sense that all persons in Illinois are subject to the laws that the legislature promulgates. All the State has done here is file a map. This does not translate into an 'interest which is capable of being affected.' [Citation.]
>
> Neither is the map a cloud on title as maintained by the Plaintiffs. To constitute a cloud on

> title there must be a semblance of title which is, in fact, unfounded and which casts a doubt upon the validity of the record title. A valid interest in property cannot be a cloud on title. [Citation.]
>
> It is therefore ordered that this case is dismissed for the reasons set forth in this order and in the Court's previous rulings. Since it is clear at this point that there are no facts in this case which would entitle the Plaintiffs to relief, this case is dismissed with prejudice."

Plaintiffs timely appeal [sic].

On appeal, plaintiffs first challenge the propriety of the trial court's dismissal of the second amended complaint for declaratory relief. In reviewing the propriety of the trial court's decision on a motion to dismiss pursuant to section 2-615 of the Code, we take as true all well-pleaded facts in the complaint. *Jackson v. South Holland Dodge, Inc.*, 197 Ill. 2d 39, 44 (2001). The question to be resolved is whether the allegations of the complaint, when viewed in the light most favorable to the plaintiff, sufficiently state a cause of action upon which relief may be granted. *Jackson*, 197 Ill. 2d at 45. We review *de novo* the trial court's decision on a section 2-615 motion to dismiss. *Schramer v. Tiger Athletic Ass'n of Aurora*, 351 Ill. App. 3d 1016, 1019 (2004).

This matter comes before us in a somewhat confused procedural posture. Plaintiffs are challenging the propriety of the trial court's order that they failed to adequately plead an action for declaratory relief. In a declaratory judgment action, there must be an actual controversy between adverse parties, and the party requesting relief must possess some claim, interest, or right that is capable of being affected by the grant of the relief sought. *Village*

of Itasca v. Village of Lisle, 352 Ill. App. 3d 847, 851 (2004). In order to seek a declaratory judgment, a party must have a real interest in the outcome of the controversy, *i.e.*, the party must have standing. *Village of Itasca,* 352 Ill. App. 3d at 851. The doctrine of standing precludes parties who have no interest in the controversy from bringing suit. Standing requires some injury to a legally cognizable interest. The injury must be "actual or threatened, and it must be (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief." *Village of Itasca,* 352 Ill. App. 3d at 851.

As we noted above, this appeal presents a somewhat confused issue due to the unusual procedural posture presented here. Normally, a challenge to the constitutionality of a statute would not be dismissed at the pleading stage but, rather, would be resolved in a motion for judgment on the pleadings or in a motion for summary judgment. In our plenary review of plaintiffs' second amended complaint, we find that they have met the technical pleading requirements to maintain an action for declaratory relief. Plaintiffs allege that their properties have been affected by the statute. The map recorded by defendants encompasses parts of plaintiffs' various properties. Plaintiffs allege that the recording of the map has clouded their titles to their properties. Further, the terms of the statute require plaintiffs to seek defendants' approval before improving their properties. Although only 2 of the more than 40 plaintiffs allege that they have delayed plans for improving their properties, the remaining plaintiffs allege that section 4-510 would place their properties under governmental control should they decide to improve their properties. In addition, plaintiffs have pleaded at least a

threatened injury to their interests. According to plaintiffs, section 4-510 creates an option to take their properties that is vested in defendants for an indefinite period of time. When a plaintiff here decides to improve his property, he must run the gauntlet of condemnation by defendants. Finally, according to plaintiffs, the recorded map of reservation operates as a cloud on title that depresses their property values. We find that these allegations, when viewed in the light most favorable to plaintiffs, suggest at least the imminent threat of an injury caused by defendants' invocation and use of the provisions of section 4-510. Thus, we find that the trial court erred in dismissing plaintiffs' second amended complaint for failing to adequately plead standing. That said, however, we hold that the trial court properly dismissed plaintiffs' second amended complaint.

In reaching this conclusion, we note that plaintiffs invite us to reach the merits of their challenges to section 4-510. Usually, questions not reached in the trial court are remanded for the trial court to consider first before we review them. However, because the question presented here is purely a question of law, we may review it and render any judgment that should have been made. *Shortridge v. Sherman,* 84 Ill. App. 3d 981, 986 (1980).

Plaintiffs argue that section 4-510 violates the due process clause because it impermissibly depresses their property values and would minimize defendants' costs in acquiring the properties if they are condemned at some time in the future. In interpreting statutory language, our primary purpose is to ascertain and give effect to the legislature's intent. We do this by construing the language the legislature employed in drafting the statute. *Puffer-Hefty School District No. 69 v. Du Page Regional Board of*

School Trustees, 339 Ill. App. 3d 194, 201 (2003). A statute enjoys a strong presumption of constitutionality, and the party challenging a statute's constitutionality bears the burden of rebutting the presumption and establishing a constitutional violation. *Puffer-Hefty,* 339 Ill. App. 3d at 201. A court, therefore, will construe a statute to be constitutional where it can reasonably do so. *Puffer-Hefty,* 339 Ill. App. 3d at 201.

Plaintiffs' contention is based on a misreading of section 4-510. One of plaintiffs' key points is that section 4-510 circumvents the law of eminent domain by dispensing with the necessity of the condemning body making a finding of public need in order to acquire the property via condemnation. This contention is belied by the plain words of the statute. Section 4-510 provides, pertinently, that, upon being notified of a landowner's intention to construct an improvement on land earmarked for future highway development,

> "[t]he Department shall have 45 days after receipt of that notice to inform the owner of the Department's intention to acquire the land involved; after which, it shall have the additional time of 120 days to acquire such land by purchase or to initiate action to acquire said land through the exercise of the right of eminent domain." 605 ILCS 5/4-510 (West 2002).

Thus, once defendants decide to acquire plaintiffs' land other than by purchase, they must employ condemnation proceedings under the eminent domain law (735 ILCS 5/7-101 *et seq.* (West 2002)) to accomplish their purpose. Plaintiffs' contention that section 4-510 dispenses with the procedural requirements of eminent domain law is not borne out by the plain language of section 4-510.

The cases relied upon by plaintiffs to support this argument are inapposite. In *People ex rel. Director of Finance v. Young Women's Christian Ass'n,* 86 Ill. 2d 219, 237 (1981), the court determined that there had not been a formal determination of necessity sufficient to support the petition for eminent domain at issue in that case. Here, by contrast, there is no issue of eminent domain, only the recording of a map denoting the right of way for possible future highway construction. Likewise in *Goldman v. Moore,* 35 Ill. 2d 450, 453-54 (1966), which held that the condemning body's failure to pass a resolution regarding the acquisition of land by eminent domain required dismissal of the eminent domain petition. The statute at issue here, by contrast, requires defendants to avail themselves of the eminent domain law only at such time as they decide to condemn any of the properties at issue in this case. Thus, necessity, as used in the eminent domain law, is not implicated until such time as defendants decide to acquire property via the use of their eminent domain powers. *Director of Finance* and *Goldman* are inapposite.

Plaintiffs also contend that section 4-510 attempts to override or bypass the well-settled judicial interpretations of constitutional requirements. While it is true that the legislature cannot enact a statute that overrides or circumvents the constitution (see *Chicago Bar Ass'n v. Department of Revenue,* 163 Ill. 2d 290, 297 (1994)), we see nothing in section 4-510 that circumvents the constitutional requirements of the exercise of the power of eminent domain. Indeed, section 4-510 commands defendants to negotiate the acquisition of the subject property or to "initiate action to acquire said land through the exercise of the right of eminent domain" (605 ILCS 5/4-510 (West

2002)), *i.e.*, to use the eminent domain law (735 ILCS 5/7-101 *et seq.* (West 2002)) to acquire the subject property. We reject this contention.

Plaintiffs next contend that, because section 4-510 confers unfettered discretion upon defendants with no standards by which defendants are to constrain their discretion in implementing section 4-510, it is void. While we do not disagree with plaintiffs' statement of what the law is (see *In re Application for Judgment & Sale of Delinquent Properties for the Tax Year 1989,* 167 Ill. 2d 161, 176-77 (1995)), we find no application of that statement of the law to this case. Plaintiffs fail to note that section 4-510 is, at heart, a procedural provision setting forth the manner in which the creation and dissemination of planned highway expansions are to be conducted. Plaintiffs' argument, that defendants confuse that process with the standards by which they are to exercise their discretion in this matter, is therefore unavailing. We also note that the Highway Code (605 ILCS 5/1-401 *et seq.* (West 2002)) consists of far more than section 4-510 and provides a comprehensive scheme to regulate the construction and maintenance of the state's highways. Plaintiffs' focus on section 4-510 to the exclusion of all other provisions contained in the Highway Code is too narrow.

While plaintiffs do not explicitly make the argument, they appear to suggest that section 4-510 is unconstitutional because it depresses the value of their properties or prevents them from realizing the full use of their properties. To the extent, therefore, that plaintiffs are complaining that section 4-510 constitutes an improper taking of their properties, we disagree. While plaintiffs have alleged that their land values have decreased as a result of defendants' recording the reservation map, they have pleaded

no facts to support this conclusion. In addition, they have pleaded no facts regarding how they have been prevented from using their properties or how defendants' invocation of section 4-510 has deprived them of the current economic use of their land. No taking occurs unless the condemning body physically intrudes upon the premises or has radically curtailed the owner's use of his property. *Towne v. Town of Libertyville,* 190 Ill. App. 3d 563, 568 (1989). The failure specifically to plead how they were damaged by the recording of the map, or how they were deprived of all or an essential use of their properties, dooms this argument. See *Towne* 190 Ill. App. 3d at 568-69.

Last, plaintiffs point to a number of cases standing for the proposition that laws or ordinances that act to freeze or depress property values violate the due process clause and the prohibition against deprivation of property without just compensation. We find the cases relied upon by plaintiffs to be distinguishable. In most of those cases, the court disapproved of a zoning provision or municipal ordinance that prevented the land's value from increasing or that decreased the land's value. *Robertson v. City of Salem,* 191 F.Supp. 605 (D. Or. 1961) (ordinance precluding business uses was unconstitutional taking); *Board of Commissioners of State Institutions v. Tallahassee Bank & Trust* Co. 108 So. 2d 74 (Fla. App. 1958) (zoning restriction was invalid where imposed to avoid increase in cost of acquiring property); *Carl M. Freeman Associates. Inc. v. State Roads Comm'n of Maryland,* 252 Md. 319, 250 A.2d 250 (1969) (county ordinance precluding rezoning of property within highway corridor was invalid as impermissibly freezing property values); *Henle v. City of Euclid,* 97 Ohio App. 258, 125 N.E.2d 355 (1954) (refusal to rezone property to allow gas station use in view of speculative

future need to widen street was held improper); *State ex rel. Sun Oil Co. v. City of Euclid,* 164 Ohio St. 265, 130 N.E.2d 336 (1955) (building permit was improperly denied based on municipal ordinance reserving land for street where municipality did not bother to enact ordinance establishing street). Because each of these cases involved an ordinance actually prohibiting or diminishing the use of the property, we find these cases to be distinguishable. Here, by contrast, section 4-510 does not prohibit plaintiffs from using or improving their land at all; it merely requires plaintiffs to give defendants prior notice of their intent to do so. Defendants then must allow the improvement or else purchase or condemn the property. Plaintiffs are still allowed the use and development of their lands so long as the current public need does not require condemnation.

Plaintiffs also cite to one case in which a map of reservation was recorded. There, the Florida Department of Transportation recorded a map affecting most of the plaintiffs parcel of land. Under Florida law, however, no one was permitted to substantially develop land depicted on a map of reservation for a period of five years (excepting private residences). The court held that the statute was unconstitutional because it prevented the plaintiff from developing its land without subjecting it to condemnation. *Joint Ventures, Inc. v. Department of Transportation,* 563 So. 2d 622 (Fla. 1990). Here, by contrast, section 4-510 does not prohibit development or improvement; rather, it requires plaintiffs to notify defendants of their intentions. Thereafter, if defendants do not perceive the current public necessity to condemn the property, plaintiffs may develop or improve their properties as they wish.

Joint Ventures, arising under a different statutory scheme, does not support plaintiffs' contentions.

We also make one last comment. Plaintiffs' overarching concern in all of their arguments is that the Department will base its determination of a public need on a landowner's notice of his intent to construct an improvement on his property. In other words, the development or improvement of the property will trigger the public need and the ensuing condemnation action. We find this concern to be premature and misplaced. Plaintiffs argue that an intention to improve cannot be the basis to create a public need. We find that the appropriate time to raise such an argument is when, if ever, the Department commences an action to condemn. Right now, in response to the notification of intention to improve, the Department determines whether it will attempt to negotiate for the purchase of the property or a portion of the property. If the Department decides to attempt to acquire the property, then the landowner may refuse to sell it. Regardless of the landowner's decision, the negotiations are voluntary and do not implicate the Department's powers of eminent domain. Likewise, the concept of public need as used in eminent domain proceedings is irrelevant at the point where the Department and the landowner are voluntarily negotiating. If the landowner refuses to sell land to the Department, then the Department may institute a condemnation proceeding. Then, if a public need for the land exists, the Department will prevail in the condemnation suit and acquire the land; if a public need for the land does not exist, then the landowner will be able to traverse the condemnation and the Department will be unable to condemn the land. Public need, therefore, is properly addressed only in the context of a condemnation

proceeding, and plaintiffs' concerns about the interplay of need and section 4-514 are premature and misplaced.

For the foregoing reasons, the judgment of the circuit court of Kendall County is affirmed.

Affirmed.

CALLUM and KAPALA, JJ., concur.

IN THE CIRCUIT COURT FOR THE
SIXTEEN JUDICIAL CIRCUIT
KENDALL COUNTY, ILLINOIS

Marvel Davis et al. Plaintiffs,	)	
vs.	)	No. 02 MR 50
Illinois Department of Transportation and Kirk Brown, Defendants.	)	

ORDER

(Filed Mar. 24, 2004)

This matter comes before the Court on the Defendants motion to dismiss the Plaintiff's second amended complaint pursuant to 735 ILCS 2/5-615. The Court has heard the arguments of counsel, has read the memoranda submitted to it and has been fully advised in the premises. The Plaintiff's second amended complaint adds nothing new to this case. It still contains the fatal defects set forth in the Court's previous orders of dismissal. Even considering the Plaintiffs' constitutional arguments, they lack standing to make them. There is neither an injury nor an immediate danger of sustaining an injury to some legally cognizable interest at this stage and there are no facts which have been pled which show that there is an actual controversy between adverse parties. The legislation complained of does not affect the Plaintiffs at this juncture except in the general sense that all persons in Illinois are subject to the laws that the legislature promulgates. All the State has done here is file a map. This does not translate into an "interest which is capable of being affected."

Flynn vs. Ryan, 199 Ill.2d 430 (2002). Neither is this map a cloud on title as maintained by the Plaintiffs. To constitute a cloud on title there must be a semblance of title which is, in fact, unfounded and which casts a doubt upon the validity of the record title. A valid interest in property cannot be a cloud on title. *Illinois Dist. of American Turners, Inc. vs. Rieger,* 329 Ill.App. 3d 1063 (2d District 2002).

It is therefore ordered that this case is dismissed for the reasons set forth in this order and in the Court's previous rulings. Since it is clear at this point that there are no facts in this case which would entitle the Plaintiffs to relief, this case is dismissed with prejudice.

Dated this 23rd day of March, 2004.

/s/ Leonard J. Wojtecki
Judge

IN THE CIRCUIT COURT FOR THE
SIXTEEN JUDICIAL CIRCUIT
KENDALL COUNTY, ILLINOIS

Marvel Davis et al. Plaintiffs,	)	
vs.	)	No. 02 MR 0050
Kirk Brown and the Illinois Department of Transportation, Defendants.	)	Judge Wojtecki

ORDER

(Filed Jun. 26, 2003)

This matter comes before the Court on the Defendant's motion to dismiss the Plaintiff's Amended Complaint under 735 ILCS 2/5-615 and 2/5-619(a)(1).

The Plaintiffs have filed this action under three counts. The first count asserts that the Plaintiffs have been deprived of due process of law because the Illinois Department of Transportation has recorded a map of reservation on their property and therefore their property values as well as property development are "frozen" with no recourse to appeal the Department's decision. The second count asserts a claim for inverse condemnation and the third count claims that 605 ILCS 5/4-510 is unconstitutional on its face and as applied because the statute allows for an "impermissible exercise of the State's police power".

Count one is dismissed under 735 ILCS 5/2-615 because it fails to state any facts which create a cause of action. As the Court has stated in its previous order, the

United States Supreme Court has defined what constitutes a taking of property. *Tahoe-Sierra Preservation Council, Inc. et al. vs Tahoe Regional Planning Agency et al.*, 535 US ___, (2002) (Slip Opinion No. 00-1167).

In this case the Plaintiffs have not stated any facts which demonstrate either an actual taking of their property by the State of Illinois or that the State has imposed restrictions on their property so severe that the restrictions amount to a taking of property. No facts have been even pled that the State of Illinois has actually prevented any of the Plaintiffs from developing their respective properties in anyway or that there has been an actual forbearance of the use of any of their properties because of any acts or representations by the State. This is not to say that the statute (605 ILCS 5/4-510) is immune from constitutional attack, only that there has to be *some* facts pled which demonstrate an *actual* injury. In this case no such facts have been pled.

The second count is dismissed under 735 ILCS 2/5-619(a) because the cause of action alleged is for an inverse condemnation. Our Supreme Court has said that where there is no actual physical taking of property mandamus will not lie and the Plaintiffs' remedy, if any, is in the Court of Claims. *Patzner vs. Baise,* 133 Ill.2d 540 at 546 (1990).

The third count is dismissed under 735 ILCS 2/5-615 because it is conclusory and fails to state any facts which demonstrate in anyway the unconstitutionality of 605 ILCS 5/4-510 as applied to these Plaintiffs. Nor is the statute unconstitutional on its face. Statutes are presumed constitutional and the burden is upon the party challenging the constitutionality of a statute to clearly

demonstrate otherwise. In this case there has been no such demonstration in this pleading.

It is therefore ordered that counts one and three are dismissed without prejudice and the Plaintiffs are granted leave to file an amended complaint within 21 days of the date of this order or stand on those counts. Count three is dismissed with prejudice.

Dated this 26 day of June, 2003.

/s/ Leonard J. Wojtecki
Judge

IN THE CIRCUIT COURT
FOR THE SIXTEEN CIRCUIT
KENDALL COUNTY, ILLINOIS

Marvel Davis, et al.	)	
Plaintiffs,	)	
vs.	)	No. 02 MR 0050
Kirk Brown and the Illinois Department of Transportation,	)	Judge Wojtecki
Defendants.	)	

ORDER

This matter comes before the Court on the Defendant's motions to dismiss, pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619(a)(9).

The Plaintiffs filed an action for declaratory judgment predicated upon the premise that their property has been taken by the government (Count I – violation of procedural due process; Count II – violation of substantive due process; Count III – unconstitutionality of 605 ILCS 5/4-510; Count IV – inverse condemnation; Count V – statutory violation of 605 ILCS 5/4-510 and Count VI – denial of due process).

The Defendants argue essentially that the Plaintiff's complaint for declaratory relief should be dismissed because the facts alleged in the Plaintiff's complaint do not demonstrate a taking by the government and that therefore the Plaintiff's have not been injured. The Defendants reason that absent an injury the Plaintiff's lack standing to request declaratory relief and therefore cannot

challenge the constitutionality of the statute (605 ILCS 5/4-510) or claim damages.

Under 735 ILCS 5/2-615 a motion to dismiss admits all well-pleaded facts as true, it does not admit conclusions of law or fact [sic] which are unsupported by allegations of specific facts which warrant those conclusions. *Groenings vs. City of St. Charles,* 215 Ill. App. 3rd 295 (Second District 1991). In this case the Plaintiffs have not alleged any facts which would entitle them to relief. There are no specific factual allegations that any of the Plaintiffs have been actually been prevented from incurring development costs or making improvements to their land by the government or that the Plaintiffs have engaged in any forbearance because of the acts of the government. There are no factual allegations which demonstrate an actual physical taking of the Plaintiffs property by the government. The only factual allegation concerning this is the mere recording of a map of land reservation by the state.

A taking can be defined either as a physical taking, or a law or regulation which imposes restrictions so severe that they are tantamount to a taking. Where the taking is physical the act is obvious, whereas if the taking is by a law or regulation the predicate of a taking is not self-evident, and the analysis is more complex. Under some circumstances a taking can occur because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation by the government. *See, Tahoe-Sierra Preservation Council, Inc. et al. vs. Tahoe Regional Planning Agency et al.,* 535 US ___ (2002) (Slip Opinion No. 00-1167).

In this case no facts are pled in support of a claim that there has been either an actual physical taking or the

imposition of restrictions so severe as to constitute a taking of the Plaintiffs' property.

Additionally, the Plaintiffs' complaint fails to conform to 735 ILCS 5/2-603 and is replete with factual and legal conclusions.

Therefore for the reasons set forth above, the Defendant's motion to dismiss is granted pursuant to 735 ILCS 5/2-615.

Because this case is dismissed it is not necessary at this time to rule on the Defendants motion to dismiss under 735 ILCS 5/2-619(9) because an amended compliant [sic] could produce facts which would demonstrate standing.

It is ordered that this case is dismissed without prejudice. The Plaintiffs are granted 30 days to amend or stand on their complaint.

Dated this 8th day of January, 2002.

/s/ Leonard J. Wojtecki
Judge